

COURT NO. 7

1. Anoop Kumar son of Sohan Lal
2. Sohan Lal son of Munna Singh
Both residents of village Jadsari,
Police Station Udaipur,
District- Tehri Garhwal Appellants

Versus

State Opposite Party

**Sri Rajiv Mohan, learned Amicus Curiae for the appellants.
Sri Harish Pujari, learned Addl. G.A. for the State.**

Dated: 23.10.2007

Hon'ble Dharam Veer, J.

This criminal appeal, preferred under Section 374 (2) of The Code of Criminal Procedure, 1973 (hereinafter referred to as Cr.P.C.) is directed against the judgment and order dated 03.03.1988 passed by Sessions Judge, Tehri Garhwal in Sessions Trial No.4 of 1987, State v. Anoop Kumar and another, whereby the learned Sessions Judge has convicted appellant Anoop Kumar under Sections 366 and 376 of The Indian Penal Code, 1860 (hereinafter referred to as I.P.C.) and awarded sentence of four years' R.I. under Section 366 I.P.C. and eight years' R.I. under Section 376 I.P.C. and it has been directed that both the sentences shall run concurrently and appellant Sohan Lal has been convicted under Section 368 I.P.C. and awarded sentence of four years' R.I.

2. In brief, the prosecution case is that Bahadur Lal lodged an F.I.R. at Police Station Narendra Nagar on 09.10.1985 at 16.30 hours with the allegation that his daughter namely Km. Suneeta alias Babli had gone to take tuition on 08.10.1985 at 7.00 AM from one Shakti Prasad Bijalwan but she could not return to her house and he had waited her up to 8.00 PM in the night and had searched her. Thereafter, he came to know that her daughter had gone with Anoop Kumar in the bus of Dehradun Depot. That fact was informed to him by Suneel Kumar Gureja, who had seen Anoop Kumar along with his daughter at the Rishikesh Bus Station. That F.I.R. is Ex.Ka-2 and on the basis of the F.I.R., the *Chik* F.I.R. was prepared by Head Moharir Bharose Lal i.e. Ex.Ka-3. The entry was made in the G.D., the copy of the G.D. is Ex.Ka-8. Victim Km. Suneeta was recovered by the police on 15.10.1985 from the house of appellant Anoop Kumar along with Anoop Kumar and the recovery memo was prepared, that recovery memo is Ex.Ka-1. After that victim Km. Suneeta was medically examined by Dr. S.L. Jain, Medical Officer, P.P. Centre, Narendra Nagar on 16.10.1985 at 11.00 AM, that medical report is Ex.Ka-6. She was referred for the X-ray and the Senior Medical Superintendent, District Suman Hospital Narendra Nagar, Tehri Garhwal submitted a report i.e.Ex.Ka-7. During the course of investigation, the Investigating officer prepared the site plan of the place of occurrence where the victim Km. Suneeta was recovered, i.e. Ex.Ka-4. Investigation of the case was entrusted to S.I., R.S. Tomar and later on it was transferred to S.I. Praveen Chaudhari. S.I. Praveen Chaudhari after completing the investigation submitted the charge sheet on 07.11.1985, that charge sheet is Ex.Ka-5.

3. Learned C.J.M., Tehri Garhwal committed the case to the Court of Session on 06.03.1986 under Section 209 Cr.P.C. after complying the provisions of Section 207 Cr.P.C.

4. Learned Sessions Judge, Tehri Garhwal framed charges against appellant Anoop Kumar under Sections 366 & 376 I.P.C. and against appellant Sohan Lal under Section 368 read with Section 366 I.P.C. on 24.04.1986 and the charges were read over and explained to the appellants who pleaded not guilty and claimed to be tried.

5. To prove its case the prosecution examined P.W.1 Km. Suneeta (victim), P.W.2 Lalit Mohan, P.W.3 Bahadur Lal (complainant of the case), P.W.4 Sunil Kumar Gureja, P.W.5, S.I. Praveen Chaudhari (Investigating Officer), P.W.6 Dr. S.L. Jain, P.W.7 S.I. Rikshpal Singh Tomar, who was also Investigating Officer. After that the statement of the appellants were recorded under Section 313 Cr.P.C., who denied the allegations made against them and in defence they did not produce any oral or documentary evidence.

6. After appreciating the evidence on record and hearing learned counsel for both the parties, learned Sessions Judge, Tehri Garhwal has convicted appellant Anoop Kumar under Sections 366 and 376 I.P.C. and awarded sentence of four years' R.I. under Section 366 I.P.C. and eight years' R.I. under Section 376 I.P.C. and it has been directed that both the sentences shall run concurrently and appellant Sohan Lal has been convicted

under Section 368 I.P.C. and awarded sentence of four years' R.I.

7. Against the said judgment and order, the appellants have preferred the instant appeal.

8. I have heard Sri Rajiv Mohan, learned Amicus Curiae for the appellants as well as Sri Harish Pujari, learned Additional Government Advocate for the State and perused the entire record of the trial court.

9. To prove its case the prosecution has examined P.W.1 Km. Suneeta, who has stated in her statement that the appellants were known to her before this incident. Anoop Kumar used to come in her house and the marriage of her elder sister was fixed with the accused-appellant Anoop Kumar. The said incident had happened on 08.10.1985 at 7.00 AM. She was going to take tuition from the teacher, namely, Shakti Bijalwan. When she reached at the motor road, there appellant Anoop Kumar met her and told her that he had taken a book for her elder sister and that book was in the Darbar. Her elder sister was a student of B.A. final year. She went with Anoop Kumar in the Darbar and there Anoop Kumar committed rape with her. Thereafter, Anoop Kumar asked her to go with him to Rishikesh then she went along with Anoop Kumar to Rishikesh. She and Anoop Kumar went 20 Kms on feet and after reaching at road they went to Rishikesh by bus. She has further stated that she and Anoop Kumar reached at Rishikesh Bus Stand at 9.00 AM and at Rishikesh Anoop made her sit at the shop of photographer of Puja Studio and Anoop came there after 20 minutes with box and bed, then

Anoop told her to go to Dehradun with him and in the evening they would come back to Rishikesh. From Puja Studio she and Anoop went to the bus station in the three wheeler then they went to Dehradun by bus. Sunil Kumar Gureja met her in the bus and she knew him before the said occurrence as she used to visit at his shop in Narendra Nagar. On the same day she and Anoop reached to Dehradun at 12.30 PM in the day and there she and Anoop went to the house of Anoop's sister, namely Savitri Devi where Savitri Devi was present and Anand, who was brother of Anoop was also there and the wife of Anand and daughter of Anand, viz. Mamta and the husband of Mamta, viz. Santosh, who was the nephew of Anoop were also present there and in their house Anoop committed rape with her in the night. Next day morning she went from Dehradun to Jadsari by bus with Anoop. She went up to Ganga Bhogpur by bus (Gari) and after that she went along with Anoop to Jadsari on foot about 20-25 Kms. On 15.10.1985 her uncle Lalit Mohan and maternal uncle Bhitkani Lal along with the police came in the house of Anoop Kumar at Jadsari where she along with Anoop Kumar was present. Then she was brought to Narendra Nagar Police Station along with her uncle and maternal uncle and next day she was medically examined by the Medical Officer at Narendra Nagar. After that her statement was recorded in the court of S.D.M. and after that she was given in the Supurdagi of her mother and father. In the cross-examination in para 28 she has stated that घटना के दो ढाई महीने पहले से मुलजिम प्रत्येक सप्ताह में एक बार मेरे घर आता था। घर आकर वह बैठता भी था। बातचीत भी करता था और कभी रात में भी रुकता था। सभी लोगों से वह प्रेमपूर्वक बातचीत करता था। Accused-appellant Anoop Kumar used to come to her house once in a week from two and half

months before this incident. He used to sit in her house and used to talk also. He occasionally stayed at her house in nights and used to talk affectionately with all members of her family.

10. P.W.2 Lalit Mohan has stated in his statement that accused-appellants were known to him. Suneeta is daughter of his elder brother. On 08.10.1985 in the morning Suneeta had gone to take tuition. When he came back to the house in the day, his sister-in-law (Bhabhi) told him that Sunita had not come back to the house. Thereafter, he, his sister-in-law and nephew searched Suneeta but they could not get her. Next day morning on 09.10.1985, he went to his elder brother Bahadur Lal, who was employed at Zaripani and he told his elder brother about the incident and both of them came back to Narendra Nagar where on 09.10.1985 he met Sunil Kumar Gureja in the market then Sunil Kumar Gureja told him that he had seen Suneeta at Rishikesh Bus Stand with accused Anoop Kumar. On the information given by Sunil Kumar Gureja, Bahadur Lal prepared a report and lodged in Narendra Nagar Police Station. On the information received that Suneeta was in the house of Anoop Kumar at Jadsari, he along with the police went to the house of Anoop Kumar at Jadsari on 15.10.1985 where he found Suneeta along with Anoop Kumar. The recovery memo and the arrest of Anoop Kumar was prepared that is Ex.Ka.1. Sohan Lal, father of Anoop Kumar, was also there.

11. P.W.3 Bahadur lal is the father of victim Km. Suneeta and the complainant. He has stated that the accused appellants were known to him and Suneeta is

his daughter and Beena is his elder daughter. He has further stated that talk in relation to marriage of Beena and Anoop Kumar was going on. On 09.10.1985 Sunil Kumar Gureja told him that on 08.10.1985 at 11 O' clock he had seen Suneeta along with Anoop Kumar at the Rishikesh Bus stand. After that he lodged the F.I.R. in the Police Station Narendra Nagar, that F.I.R. is Ex.Ka-2.

12. P.W.4 is Sunil Kumar Gureja, who has stated that the accused-appellants were known him and Suneeta and Bahadur Lal were also known to him. On 08.10.1985 at 11.00 AM he was at Rishikesh Bus Station then he saw that Anoop Kumar and Suneeta were sitting in the bus and that bus was going to Dehradun. That fact was told by him to the mother and father of Suneeta on 09.10.1985 and also to the brother-in-law of Bahadur Lal.

13. P.W.5 is S.I. Praveen Chaudhari (Investigating Officer), who has stated that on 09.10.1985 he was posted as Sub Inspector in Narendra Nagar Police Station. On that day Bahadur Lal lodged report in the Police Station and on the basis of the report a case was registered and the investigation was entrusted to Sri R.S. Tomar, Sub Inspector. The *Chik* report was prepared by Head Moharrir Bharose Lal and he identified his signature. The *Chik* report is Ex.Ka-3. Investigation of the case was transferred to him on 12.10.1985. During the course of the investigation he recorded the statements of the witnesses. On 15.10.1985 he reached at Jadsari along with uncle and maternal uncle of victim Km. Sneeta in the house of Anoop Kumar and there he found Anoop Kumar along with victim Km. Suneeta.

Accused-appellant Sohan Lal was also present in his house. Recovery memo and arrest memo of the accused appellants was prepared i.e. Ex.Ka-1 and the site plan of the place of recovery was also prepared by him i.e. Ex. Ka-4. After that he came to the police station along with victim Km. Suneeta, appellants Anoop Kumar and Sohan Lal. On the same day Km. Suneeta and appellant Anoop Kumar were medically examined by the Medical Officer. After completing the investigation he filed the charge sheet on 07.11.1985, i.e. Ex.Ka-5.

14. P.W.6 is Doctor S.L. Jain, who has stated that on 16.10.1985 she was posted as Medical Officer in P.P. Centre, Narendra Nagar. On that day Km. Suneeta was medically examined by her and she was brought by Head Constable Pushpa Burola at 11.00 AM. In external examination she found the breasts well developed, areola black. Auxiliary hairs were sparse, brown, thin, unshaved and unnetted. Pubic hairs were thin, sparse, unshaved and brown in colour. In internal examination she found the hymen torn. Vagina easily admitted two fingers. Fine red streak was seen on the part wall of vagina at the site of attachment of hymen. Vaginal smear was taken and sent to the pathologist for examination for evidence of spermatozoa. The report of the pathologist was received and vaginal smear contained two dead non-motile spermatozoa. She has further stated that the victim was referred to the radiologist for the confirmation of her age. She has further stated in her opinion that it cannot be said with certainty that it is not a rape case. She has further stated that on the basis of the radiologist's report, the age of the victim was about 15 years. She has further stated that Radiologist की रिपोर्ट के

अनुसार लड़की की उम्र उस समय 15 साल की रही होगी, मैं इस राय की पुष्टि करती हूँ। लड़की की उम्र साढ़े सोलह साल तक की हो सकती थी। The age of the victim Km. Suneeta might be 16 and 1/2 years.

15. P.W.7 S.I. R.S. Tomar stated that on 09.10.1985 he was posted as Sub Inspector at Police Station Narendra Nagar. Initially the investigation was entrusted to him. The case was registered in his presence. He has also proved the entries made in the G.D. by Head Moharrir Bharose Lal, i.e. Ex.Ka-8.

16. After that the statement of appellants were recorded under Section 313 Cr.P.C, who denied the allegation made against them and in defence they did not produce any oral or documentary evidence.

17. Sri Rajiv Mohan, learned Amicus Curiae for the appellants has submitted that victim Km. Suneeta was major on the date of incident i.e. 08.10.1985 and as per the statement of P.W.6 Dr. S.L. Jain, the age of Km. Suneeta was 15 years as per the report of radiologist and as per the opinion of Dr. S.L. Jain, her age might be 16 and 1/2 years. He has cited a judgment of Hon'ble Supreme court rendered in the case of **Jaya Mala v. Home Secretary, Government of Jammu and Kashmir and others** reported in AIR 1982 SC 1297 and he has relied on para 9 of the judgment. On the basis of this judgment, he has argued that the judicial notice may be taken about the margin of error in age ascertained by radiological examination is two years on either side. He has submitted that as per the statement of P.W.6 Dr. S.L. Jain, the age of Km. Suneeta was 16 and 1/2 years and if the two years margin is added then the age will be 18

and 1/2 years. He has further submitted that as per the statement of victim Km. Suneeta she was a consented party. He has further argued that Km. Suneeta had gone with appellant Anoop Kumar with her own consent from Narendra Nagar to Rishikesh by bus and from Rishikesh to Dehradun by bus and from Dehradun to village Jadsari by bus and during these journeys she went 20-25 Kms on feet. This conduct of the victim Km. Suneeta shows that she was a consented party and she had gone with appellant Anoop Kumar with her own consent.

18. Learned Amicus Curiae has relied on the description sixth of Section 375 I.P.C. He has submitted that when the victim is under 16 years of age then only with or without her consent sexual intercourse is a crime but in this case the victim was 16 and 1/2 years and considering the dictum of the Hon'ble Supreme Court she was 18 and 1/2 years.

19. From reading of the statement of Km. Suneeta it reveals that she had traveled about 150 Kms by bus and in between Narendra Nagar, Rishikesh and Dehradun there are so many village and towns and the bus passes from the densely populated area and even in the bus there are so many passengers and even in the bus she met Sunil Kumar Gureja, who was known to her before the said incident but she had not complained to anybody that Anoop Kumar was taking her from her house forcibly. This conduct of the victim Km. Suneeta shows that she was consented party and she had gone with appellant Anoop Kumar with her own consent.

20. Learned Amicus Curiae has further submitted that Km. Suneeta had written a love letter to Anoop Kumar on 03.10.1985, which has been filed as paper no. 18 Kha. The love letter is quoted as under:-

“आदरणीय जीजा जी सादर प्रणाम स्वीकार मैं तुमसे कुसल चाहने हेतु श्री भगवान से प्रार्थना करती हूँ। जीजाजी आप यहाँ काफी दिन से नहीं आये, क्या कारण है तुमसे मैंने कुछ कहा था लेकिन तुमने कोई ध्यान नहीं दिया। अगर जीजाजी आप मुझे 11 या 15 ता० तक नहीं लेना आये तो मैं यहाँ पर फाँस खाकर मरूंगी वहाँ पर तुम्हारा नाम लिख कर फेंक दूँगी।

अगर आप दीदी जी से सादी करेंगे तो मैं मर जाऊंगी और तुम से उजबदास जी ने बच्चा के बारे में बताया होगा कि बीणा का ऐसा-ऐसा हुआ। आप को मेरी सच्ची नहीं आई होगी। जीजाजी आप मेरे दिल के एक टुकड़े हो और मैं कुन्जापूरी की कसम खाकर कहती हूँ कि आप को कभी भी धोखा नहीं दूँगी। और आप भी कसम खाकर पत्र लिख कर दे देना। तभी मेरे को विसवास होगी।

पत्र उसी के पास दिया करो जिसके पास पहले दिया था।

पहले पत्र का जवाब मुझे मिल गई थी लेकिन दूसरे का नहीं।

आपकी होने वाली

कु० बबली”

21. In the letter she has written that if appellant Anoop Kumar does not come to take her from her house on 11 or 15, she will commit suicide. This conduct of the victim also shows that she had fallen in love affairs as a result of which she went with appellant Anoop Kumar. In support of his argument learned Amicus Curiae has cited a judgment rendered by the Hon’ble Supreme Court in the case of **Narayan alias Naran v. State of Rajasthan** reported in (2007) 3 SCC (Cri) 198. He has relied on paras 11, 12, 13 & 15 which are as follows:-

“11. In the cross-examination the prosecutrix (PW 3) stated that she boarded the trolley at about 5 o’clock in the evening and by 7 o’clock they reached Singpur Village. There were number of villages between Singhpur and Akodiya. It is also required to appreciate that she stated in her evidence that even after the accused committed rape on her she sat in the tractor happily. It is not stated by her in her evidence that she raised any hue and cry while passing through

the number of villages. In the first information report (Ext.P-5) she stated that the accused committed rape on her thrice but in the evidence she stated that the accused committed rape on her only twice and not thrice. According to her the rape was committed on her on kankar (rough way). She did not state that she offered any resistance though she was physically very strong. Medical report (Ext.P-1) says that there were no injuries on the body of the prosecutrix (PW 3). There were no injuries on her private part. It is ultimately opined that "no definite opinion can be given regarding rape, however, she is habitual to sexual intercourse". In the circumstances, is it possible to believe that the prosecutrix (PW 3) has been subjected to rape twice by the accused as alleged? In the first information report (Ext.P-5) it is stated that the prosecutrix (PW 3) has been subjected to rape by the accused thrice but in her evidence she stated that she had been subjected to rape only twice. The accused even according to the prosecutrix (PW 3) was driving the tractor from Singhpur to Bharkiya crossing through a number of villages. It is not stated by the prosecutrix (PW 3) that she made any attempt to get down from the tractor at any point of time. On the other hand, it is stated by her that she sat in the tractor happily.

12. Yet another important aspect of the matter, in the first information report and as well as in her evidence the prosecutrix (PW 3) stated that she revealed the entire episode of committing rape on her by the accused to Smt Tejkanwar (PW 6) in whose house in Akodiya Village she slept on the fateful night. She also state about the accused's snatching of Rs.1000 from her and also some jewellery. Smt Tejkanwar (PW 6) in her evidence did not state that the prosecutrix (PW 3) narrated the incident of rape committed on her by the accused to her. The evidence of the

prosecutrix (PW 3) is full of material contradictions. There is no corroboration whatsoever from any of the witnesses, more particularly in the evidence of Smt Tejkanwar (PW 6) who is a material witness. It is true, the evidence of the prosecutrix (PW 3) itself, if acceptable, is sufficient to establish the charge against the accused but her evidence is so artificial with cannot be accepted.

13. In the circumstances, we are of the considered opinion that the prosecution miserably failed to establish the charge against the appellant for the offence punishable under Section 376 IPC.

15. For all the aforesaid reasons, we hold that the prosecution failed to establish the charges framed against the appellant for the offences punishable under Sections 376 and 392 IPC. The conviction as well as sentences imposed upon the appellant for the offences punishable under Sections 376 and 392 IPC are accordingly set aside.”

22. Learned Amicus Curiae has further argued that P.W.2 Lalit Mohan, P.W.3 Bahadur Lal and P.W.4 Sunil Kumar Gureja are the formal witnesses and the only evidence against the present appellants is the statement of P.W.1 Km. Suneeta and the statement of Km. Suneeta does not inspire confidence. He has further submitted that conviction cannot be based on the solitary evidence which does not inspire confidence. In support of his argument, he has cited a judgment rendered by the Hon’ble Supreme Court in the case of **Joseph v. State of Kerala** reported in (2003) 1 SCC 465 and relied on para 13 which is quoted below:-

“13. To our mind, it appears that the High Court did not follow the aforesaid standard but went on to analyse evidence as if the material before them was given

for the first time and not in appeal. Section 134 of the Indian Evidence Act provides that no particular number of witnesses shall in any case be required for the proof of any fact and, therefore, it is permissible for a court to record and sustain a conviction on the evidence of a solitary eyewitness. But, at the same time, such a course can be adopted only if the evidence tendered by such witness is cogent, reliable and in tune with probabilities and inspires implicit confidence. By this standard, when the prosecution case rests mainly on the sole testimony of an eyewitness, it should be wholly reliable. Even though such witness is an injured witness and his presence may not be seriously doubted, when his evidence is in conflict with other evidence, the view taken by the trial court that it would be unsafe to convict the accused on his sole testimony cannot be stated to be unreasonable.”

23. Learned Amicus Curies has further submitted that the evidence of the solitary witness should be accepted with caution. He has further submitted that it is permissible to record and sustain a conviction on the evidence of a solitary eyewitness. But, at the same time, such a course can be adopted only if the evidence tendered by such witness is cogent, reliable and in tune with probabilities and inspires implicit confidence.

24. Learned Amicus Curiae has further submitted that the F.I.R. in the above said case was lodged by the father of the victim about 34 hours delay whereas the distance between the police station and the place of occurrence is only half kilometer that is fatal for the prosecution case. In support of his submission, learned Amicus Curiae has cited a judgment rendered by the Hon’ble Supreme Court in the case of **State of**

Karnataka v. Mapilla P.P. Soopi reported in (2003) 8 SCC 202. He has relied on para-4 which is as follows:-

“Undue delay in lodging the complaint without acceptable evidence has also contributed to the doubt in the prosecution case. Hence, the High Court was justified in allowing the appeal.”

25. On the basis of the evidence discussed above and the judgments of the Hon'ble Supreme Court cited above, it reveals that the victim Km. Suneeta was more than 16 and 1/2 years on the date of incident i.e. 08.10.1985 and if the two years margin is given, she will be 18 and 1/2 years, hence the victim was major at the time of incident. From the conduct of victim Km. Suneeta it also reveals that she was a consented party as she had gone with appellant Anoop Kumar with her own consent due to love and affection. Moreover, the sole testimony of Km. Suneeta does not inspire confidence as it is not cogent and reliable and creates doubt in the prosecution story and on the basis of sole testimony, which does not inspire confidence, conviction cannot be made against the appellants in the aforesaid Sections.

26. In view of the discussions made above and the dictum made in the judgments (supra), the prosecution has failed to establish the offence punishable under Sections 366 and 376 I.P.C. against the appellant Anoop Kumar and under Section 368 I.P.C. against appellant Sohan Lal beyond reasonable doubt. Hence, no offence under Section 366 and 376 I.P.C. is made out against appellant Anoop Kumar and under Section 368 against

appellant Sohan Lal. Accordingly, the appellants are liable to be acquitted.

27. After considering all the facts and circumstances of the case as narrated above, the judgment of the court below is not justified and correct, as per the law and the evidence available on record.

28. Accordingly, the appeal is allowed. Judgment and order dated 03.03.1988 passed by Sessions Judge, Tehri Garhwal in Sessions Trial No.4 of 1987 as well as the conviction and sentence made against the appellants in the above said Sections is hereby set aside.

(Dharam Veer, J.)

23.10.2007

RBS